LIM THENG HOE v. COMMISSIONER OF LAND TITLES, PENANG

[A.C.J. (Edgar Joseph Jr. J.) October 20, 1983, July 24 & 29, August 23, 1985]

[Penang – Land Titles Appeal Board Case No. 4 of 1981]

Land Law – Issue of indefeasible title – Substitution of "Grant" for "Grant First Grade" by Commissioner of Land Titles – Pre-existing estate in fee simple – Document of original title – New tenure not less beneficial than original one – Question of what title to allocate – National Land Code (Penang and Malacca Titles) Act, 1963, ss. 4, 15, 18, 34-41, 46, 53 & 55 – Courts of Judicature Act, 1964, s. 35 – Crown Lands Ordinance (Cap. 113), s. 11.

This case concerning land comprised in Holding 255 held under Statutory Land Grant 194/4956 came before the court by way of a Special Case under section 18(1) of the National Land Code (Penang and Malacca Titles) Act, 1963 ("the Act"). The two questions of law for decision are:

(a) should the Director [of Lands and Mines, Penang] have applied section 40 or section 41 of the Act?

(b) if section 41 applies, is the title to Holding No. 255 held in fee simple or not?

Sections 40 and 41 of the Act read:

"40. Where the document of original title to a holding is a grant, indenture or other form of title made or issued by the Dutch Authorities or by the East India Company or by any Government of the State, and such title created a pre-existing estate in such holding consisting of or in the opinion of the Commissioner equivalent to an estate in fee simple, a grant (first grade) shall be issued in respect of such holding.

41. Where the document of original title to a holding is either a statutory grant issued under the Lands Ordinance or a lease for nine hundred and ninety-nine years a grant shall be issued in respect of such holding."

Since October 6, 1956, the appellant has been the registered proprietor by purchase from Ban Hin & Co. Ltd. of Holding 255 measuring in area some 300 acres. The Commissioner of Land Titles inserted in the Interim Register against Holding 255 the words "Grant First Grade," but before the title had become indefeasible he changed his mind and on December 31, 1980, substituted the word "Grant" for the words "Grant First Grade." Being dissatisfied with the decision of the Commissioner, the appellant appealed under section 15 to the Land Titles Appeal Board, which stated the above and questions for decision by the court.

The High Commissioner accepted the surrender of Holding 240 and in lieu thereof there were issued to Ban Hin Co. grants of land from 19 separate holdings, of which Holding 255 registered on April 16, 1956, was the largest. Section 11(4) of the Crown Lands Ordinance (Cap. 113) provides for the making of "the new tenure not less beneficial than the original one." If the nature of Ban Hin Co.'s tenure to Holding 240 immediately before surrender was a title in fee simple, then section 40 would apply; otherwise it would be section 41. The respondent contended that in determining what title to allocate, the court could not look back further than December 31, 1965.

Held: (1) the definition of "document of original title" in section 4(1) requires the court to look back not up to December 31, 1965, but as far back as possible before that date;

(2) section 11(4) of Cap. 113 is designed in the public interest to protect the grantee of a re-grant by conferring upon him a title no less beneficial than that he enjoyed under his original grant. The words of the subsection are absolute, explicit and peremptory. They are, therefore, not capable of being waived;

(3) the Commissioner can in no way avoid the strict terms of section 11(4) of Cap. 113 and the definition of the document of original title in section 4(1) by the simple expedient of using pen and ink to make additions and deletions to a title deed for this would amount to making unauthorised amendments to explicit statutory provisions;

(4) the majority of the titles concerned confer an estate in fee simple. Therefore, a case of "majority title" arises by virtue of section 46(2)(a)(i);

(5) the answers to the questions stated are: (a) the Director should have applied section 40, and (b) in consequence of the answer to question (a), question (b) does not arise;

(6) costs to the appellant to be taxed on the higher scale; costs for two counsel refused.

Cases referred to:–

(1) *Miller* v. *Tipling* (1918) 43 Q.L.R. 88, 97; 43 D.L.R. 469, 477.
(2) *Ee Kim Kin* v. *The Collector of Land Revenue, Alor Gajah* [1967] 2 M.L.J. 89, 90.
(3) *Ford* v. *Hill* (1879) 10 Ch. Div. 365, 370.
(4) *Banning* v. *Wright* [1972] 2 All E.R. 987, 998.
(5) *Kammins Ballrooms Co. Ltd.* v. *Zenith Investments (Torquay) Ltd.* [1971] A.C. 850, 883.
(6) *Earl of Darnley* v. *London Chatham & Dover Railway Co. (Proprietors) Etc.* (1867) L.R. 2 H.L. 43, 57.
(7) *Auckland Habour Board* v. *Kaihe* [1962] N.Z.L.R. 68, 88.
(8) *Edward Ramia Ltd.* v. *African Woods* [1960] 1 All E.R. 627 P.C.

LAND TITLES APPEAL BOARD CASE.

Lim Kean Chye (*Lee Kok Liang* with him) for the appellant.

Mohd. Saari bin Yusof (State Legal Adviser, Penang) for the respondent.

Cur. Adv. Vult.

Edgar Joseph Jr. J.: The law of land, so intricately evolved in England over the centuries, has not always met unqualified adulation; for example, Riddell J. remarked in *Miller* v. *Tipling*:(1)

"It has been said that the law of land in countries under the Common Law of England is a 'rubbish heap which has been accumulating for hundreds of years; and ... is ... based upon feudal doctrines which no one (except professors in law schools) understands' – and rather with the implications that even the professors do not thoroughly understand them or all understand them the same way."

Even title deeds, those most venerated of documents, have been described, in language attributed to Lord Westbury, as being "difficult to read, disgusting to touch and impossible to understand."

At first glance, some may think that the instant case which came before me in the shape of a Special Case pursuant to the provisions of section 18(1) of the National Land Code (Penang and Malacca Titles) Act, 1963 ("the Act") will illustrate the opinions expressed above but reflection reveals that it is more concerned with the impact of modern statutes upon registered land, with its aseptic certainty and clarity of title.

For brevity and convenience, all references to sections in this judgment, unless otherwise stated, are to the Act.

Having made these general observations I shall now embark upon a consideration of the problems at hand by first stating what I consider to be the material facts in the case.

Ever since October 6, 1956, the appellant has been the registered proprietor by purchase from an incorporated company known as Ban Hin & Co. Ltd. ("Ban Hin Co.") of all that land comprised in Holding 255 Mukim 4, South West District, held under Statutory Land Grant 194/4956 in area 300 acres O rood 20 poles ("Holding 255").

Then, on January 23, 1980, the Commissioner of Land Titles ("the Commissioner") in exercise of his powers under section 34(b) inserted in the Interim Register, against particulars relating to Holding 255, the words 'Grant First Grade.'

Section 34(1)(b) provides:

"34.(1) At any time before the title to a holding has become indefeasible pursuant to the provisions of Part VII the Commissioner may, in relation to any entry in the Interim Register relating to such holding, and whether or not he has held an enquiry in respect thereof –

(a) ...

(b) correct any erroneous entry in the Interim Register;"

But, nearly one year later, before the title to the land had become indefeasible, the Commissioner changed his mind, and on December 31, 1980, he substituted the word 'Grant' for the words 'Grant First Grade.'

The significance of this substitution can only be appreciated if regard is had to six sections of the Act namely, section 35 to section 37 and section 39 to section 41, which run as follows:

"Presumption relating to replacement title.

35. Every replacement title to which any person shall be entitled under this Part shall be deemed to arise under this Part without any formal alienation or approval thereof.

Extinguishment and replacement of existing interests.

36. Subject to the provisions of this Act, upon the appointed day all pre-existing interests in all lands in the State shall be extinguished and there shall be vested in all persons in whom were vested such interests such corresponding interests in the holdings created in relation to such lands under the provisions of this Act, and the right to such replacement titles to such holdings, as are provided by this Chapter; and unless otherwise provided by this Act, every pre-existing deed relating to a holding shall, on and after the appointed day, have effect only as evidence of the nature and extent of any pre-existing interest in such holding:

Provided that except in so far as any other provision is made by this Act nothing in this section shall be construed as preventing any such deed from operating as a contract, or as affecting the rights or liabilities of any person thereunder, either at law or in equity.

General incidents of replacement title.

37. Upon the appointed day, and thereafter until the title to a holding shall have been declared indefeasible in accordance with the provisions of Part VII –

(a) a replacement title to such holding and all interests therein shall be conclusive only to the extent that the pre-existing interests therein were conclusive according to pre-existing law;

(b) the proprietor of such holding and all other persons entitled to any interest therein shall hold such title or interest subject to all those provisions of the pre-existing law applicable thereto which are not inconsistent with the provisions of this Act;

(c) the proprietor of such holding and all other persons entitled to any interest therein shall in any dealing in respect thereof under the provisions of Part VI be bound by the covenants for title contained in section 7 of the Conveyancing and Law of Property Ordinance.

Replacement titles.

39. The replacement title in respect of any holding to which a person has a right under section 36 shall be –

(a) a grant (first grade);

(b) a grant;

(c) a State lease; or

(d) any of the titles mentioned in the preceding paragraphs with a Mukim indication,

as may be appropriate in relation to such holding under the provisions of this Chapter.

Grant (first grade).
40. Where the document of original title to a holding is a grant, indenture or other form of title made or issued by the Dutch Authorities or by the East India Company or by any Government of the State, and such title created a pre-existing estate in such holding consisting of or in the opinion of the Commissioner equivalent to an estate in fee simple, a grant (first grade) shall be issued in respect of such holding.

Grant.
41. Where the document of original title to a holding is either a statutory grant issued under the Lands Ordinance or a lease for nine hundred and ninety-nine years a grant shall be issued in respect of such holding."

Perhaps, understandably, the appellant was most unhappy at this sudden turn of events so he consulted his solicitors who commenced correspondence with the Director of Lands and Mines, Penang ("the Director") who confirmed that it was only after "a thorough study" that the substitution was made. As the correspondence appears relevant to a preliminary objection raised before me, and which I shall deal with anon, they merit reproduction in full.

The letter from the appellant's solicitors was in the following terms:

TRANSLATION "January 13, 1981.

Director of Land & Mines,
Penang.

Dear Sir,

Re: Lot No. 255 Mukim 4,
South West District, Penang.

We are instructed by our client Mr. Lim Theng Hoe the registered proprietor of the above lot to state that a search was made on the Interim Register and was disclosed that the First Grade title was cancelled and replaced by 'Grant.'

We are instructed by our client to object to such cancellation.

Our client has already applied for a certified copy of the Interim Register and was disclosed in the certified that the replacement title is Grant First Grade. As such he has expended huge sum of money in purchasing sand mining equipments and has expended further sum for excavation works and is also liable for labour and other charges and contractual obligations.

Therefore we are instructed that if the Grant First Grade is not restored our client will have no alternative but to take up this matter with the court.

Yours faithfully,

c.c.
Mr. Lim Theng Hoe,
72, Scotland Road,
Penang.

The reply from the Director was in the following terms:

TRANSLATION "January 16, 1981.

Messrs. Lee Kok Liang & Co.,
Advocates & Solicitors,
Chung Siew Yin Building,
25, Light Street,
Penang

Sir,

Holding 255 Mukim 4, South-West District

With reference to your letter dated 13/1/1981 in relation to the abovementioned subject, I wish to inform you that the land was originally held under Statutory Land Grant No. 194/4956 – 16/4/1956 and in accordance with section 41 National Land Code (Penang and Malacca Titles) 1963, it is to be substituted by a Grant only.

2. I also wish to inform you that we have made a thorough study of the original Statutory Land Grant No. 194/4956 and determined that this Document of Title is only an *Ordinary Statutory Land Grant that is subject to the conditions and covenants contained in the Crown Lands Ordinance Chapter 113.* It therefore follows that the title to be substituted for this holding is a 'Grant' under section 41 of the Act, 1963.

3. As you are aware, the Commissioner of Land Titles is empowered under section 34, Act 1963 to correct any errors found in any folio of the Interim Register, in respect of titles that have not become indefeasible. Here I reproduce section 34, Act 1963 which reads as follows:

34(1) At any time before the title to a holding has become indefeasible pursuant to the provisions of Part VII the Commissioner may, in relation to any entry in the Interim Register relating to such holding, and whether or not he has held an enquiry in respect thereof –

(a) correct any folio of the Interim Register which he is satisfied is incorrect, whether due to the inclusion of land included in another folio, or the incorrect description of the parcels or boundaries of the holding comprised therein, or for any other reason;

(b) correct any erroneous entry in the Interim Register; or

(c) add to the Interim Register any matter that has been erroneously omitted therefrom.

(2) Any correction made under sub-section (1) shall be made in such matter as to leave the erroneous matter legible, and shall be authenticated by the Commissioner's initials, together with the date on which the correction was made.

4. Because the type of title has been erroneously changed from 'Grant' to 'Grant (First Grade)' on 23/1/1980 action was taken on 31/12/1980 to correct the type of title to 'Grant' under section 34, Act 1963.

5. Should your client be dissatisfied with the explanation given above, he has the right to appeal to the court regarding this matter. We cannot accede to your request that the title be reverted to a Grant (First Grade) because the type of title to be given in substitution for this holding is only a 'Grant.'

6. Regarding the contents of paragraph (4) of your letter, please be informed that sand mining works on the land held under this 'Grant' *are permitted* provided a permit is first obtained from the Collector of Land Revenue of the district concerned.

Saya yang menurut perintah,

(Signed)
(Azizi bin Mohd. Ariffin)
Director of Lands and and Mines,
Penang."

The appellant being dissatisfied with the decision aforesaid, instructed his solicitors to lodge an appeal which they duly did, pursuant to section 15 which provides:

"Any person who is aggrieved by any decision given by the Commissioner under this Act may, unless such decision relates to a matter in which the decision of the Commissioner is final, within one month therefrom appeal to the Board by lodging with the secretary to the Board an application in duplicate in Form B."

In due course, the matter came before the Land Titles Appeal Board and, at the hearing before it, counsel for the appellant successfully applied that it reserve, for the consideration of the High Court, by way of a Special Case, pursuant to the provisions of section 18, the following questions of Law:

(a) Should the Director have applied section 40 or section 41 of the Act?

(b) If section 41 applies, is the title to Holding No. 255 held in fee simple or not?

Before me, the learned legal adviser who appeared for the respondent, without any prior notice, raised a preliminary objection, the effect of which was that the appeal was incompetent as, on the facts appearing in the Special Case, there was no *decision* to appeal from.

It was submitted that the substitution by the Commissioner of the word 'Grant' for the words 'Grant First Grade' in the appellant's title to Holding 255 was purely a ministerial act and not therefore a decision within the meaning of section 15. It was further submitted that the appellant's remedy was to make a claim under section 53(1)(b) whereupon the Commissioner would proceed to hold an enquiry under section 54(1) and, if any difficult question of law arose, he could then refer the same for the consideration of the High Court pursuant to the provisions of section 55(1).

I must say that this was a somewhat inconsistent stance to adopt, bearing in mind that before the Land Titles Appeal Board, the learned Legal Adviser, had himself concurred in the suggestion made by counsel for the appellant that questions of law could be referred to the High Court in the form of a Special Case pursuant to the provisions of section 18. Be that as it may, I do not propose to look askance at the point taken.

In my opinion, the substitution by the Commissioner of the word 'Grant' for the words 'Grant First Grade' in the appellant's title to "Holding 255", bearing in mind particularly that it was done "after a thorough study" according to the Director's letter aforesaid, was plainly an expression of a concluded opinion. If so, then it was a decision and as such appealable under section 15. A decision is a popular and not a technical word and means little more than a concluded opinion: (see *Stroud's* Judicial Dictionary, Vol. 2 4th edn. p.706). I also note that the Act does not prescribe any particular form which the decision should take.

On the other hand, if I am wrong in the view I take regarding this part of the case, I see little purpose in upholding the preliminary objection as, the only effect of doing so would be to lead to an unnecessary prolongation of proceedings which have been pending all these years before the Land Titles Appeal Board not to mention the increase in costs. I say so because if the learned legal adviser is correct, then the claim would go, in the first instance, to the Commissioner (who had himself made the substitution in the Interim Register) and who would hold an enquiry and make a decision. almost certainly confirming his earlier opinion, from which a reference would lie on a point of law to the High Court. The proceedings would thus eventually also come before the High Court, after a pointless pantomime, albeit by a different and longer route with resulting delay and consequent expense. I would, therefore, echo and with respect adopt, what Ismail Khan J. (as he then was) said in *Ee Kim Kin* v. *The Collector of Land Revenue, Alor Gajah,*[2] at page 90:

"Be that as it may, I incline with respect to the views of Dr. Bashir Mallal (see his Supreme Court Practice, vol. 1, p. 724) particularly as in this case, recourse to the most convenient practice commends itself for practical reasons. I do not think that mere technicalities should have such overriding effect as to place an impediment to the proper administration of justice. Rules of procedure should be the handmaiden not the master, for even if successful, the objection can only have the effect of delaying the decision of issues raised and serve no practical purpose. I therefore disallowed the objection."

When I drew the attention of the learned State Legal Adviser to the above criticisms of the preliminary objection he abandoned it and was quite happy to have the questions determined on the merits. In the circumstances, I need say no more about it except that if it was not open to me to consider the questions of law posed by virtue of section 18(1), then I would have done so on review under section 35 of the Courts of Judicature Act, 1964, by making the necessary declaratory orders.

I have already mentioned the facts which immediately gave rise to the appeal to the Land Titles Appeal Board but in order to understand the true scope of the problems raised by the Special Case it is necessary to go back as far as possible and trace the appellant's devolution of title.

The starting point in my examination of the legal position is section 4(1) which defines "Document of Original Title" to mean "the original grant, indenture, lease or other instrument made by such authorities, the East India Company, the Crown or the State as the case may be, from which the pre-existing title to a holding or part of a holding descends or is presumed to descend."

With the above definition in mind and, looking back, one finds that Holding 255 was originally part of Holding 240 being in area 347 acres 2 roods O poles and held under the following titles:

Grant	2627
Grant	2609
Grant	1875
Indenture	53
Indenture	60
Indenture	71
Indenture	124
Indenture	140
Indenture	177
Lease	10018
Lease	10044

By a Deed of Surrender dated November 9, 1953 No. 919/96 (Document T), Ban Hin Co., the then registered proprietor, for purposes of subdivision, applied to the High Commissioner to accept the surrender of Holding 240 and to re-grant the land comprised therein in parcels pursuant to the provisions of section 11(1) of the Crown Lands Ordinance ("Cap. 113").

The terms of the Deed of Surrender were as follows: "To hold the same unto the said Majesty, her heirs and successors to the intent that the same may be re-granted ... in parcels under and subject to the provisions of the Crown Lands Ordinance."

As a result, the High Commissioner accepted the surrender and there were issued in lieu thereof to Ban Hin Co. grants of land from 19 separate holdings, of which Holding No. 255 registered on April 16, 1956 was the largest being, as I have said, in area 300 acres O rood 20 poles.

The 19 holdings formed from the subdivision of Holding 240 are as follows:

(1)	Holding 255	– S.L.G. 194/4956
(2)	Holding 256	– S.L.G. 195/4957
(3)	Holding 257	– S.L.G. 196/4958
(4)	Holding 258	– S.L.G. 197/4959
(5)	Holding 259	– S.L.G. 198/4960
(6)	Holding 260	– S.L.G. 199/4961
(7)	Holding 261	– S.L.G. 200/4962
(8)	Holding 263	– S.L.G. 201/4963
(9)	Holding 264	– S.L.G. 202/4964
(10)	Holding 265	– S.L.G. 203/4965
(11)	Holding 266	– S.L.G. 204/4966
(12)	Holding 267	– S.L.G. 205/4967
(13)	Holding 268	– S.L.G. 206/4968
(14)	Holding 269	– S.L.G. 207/4969
(15)	Holding 270	– S.L.G. 208/4970
(16)	Holding 271	– S.L.G. 209/4971
(17)	Holding 272	– S.L.G. 210/4972
(18)	Holding 273	– S.L.G. 211/4973
(19)	Holding 274	– S.L.G. 212/4974

Section 11 of Cap. 113 which deals with the surrender of land for subdivision and its results is an important pillar in the appellant's case and deserves reproduction in full. It provides:

"11.(1) If the owner of the land comprised in any grant or lease for nine hundred and ninety-nine years is desirous of dividing or partitioning such land, he may apply to the High Commissioner to accept the surrender of such grant or lease, and to re-grant the land comprised therein in parcels.

(2) The High Commissioner if satisfied with the title of the applicant, and on payment by the applicant of all costs and expenses of, or consequent on, such application, shall accept a surrender of such grant or lease, and shall issue in lieu

thereof to the applicant grants of the said land under this Part in such portions as the applicant desires.

(3) No such division or partition shall be allowed unless all arrears, if any, of rent under the original grant or lease are paid up, and in no grant issued under this section shall a less rent than fifty cents per annum be reserved.

(4) In the case of grants issued under this section not being issued in exchange for a grant issued under this Part such modifications may be made in the form of grant prescribed as are necessary in order to make the new tenure not less beneficial than the original one.

(5) The High Commissioner, Governor in Council may make rules for carrying out the provisions of this section."

Having regard to the provisions of section 11(4) of Cap. 113, it is vitally important to determine the nature of Ban Hin Co.'s tenure to Holding 240 immediately before surrender. If my investigation reveals that it was a title in fee simple then, clearly, the Director would have to apply section 40 otherwise it will be section 41. It is as simple as that.

Now, the main plank in the learned Legal Adviser's submission was this: in determining what title to allocate to the appellant the court was to look back only up to December 31, 1965 but no further.

He first referred to the definition of the term "document of original title" in section 4(1) reproduced above.

He next referred to the definition of "pre-existing" in section 4(1) which provides: " 'pre-existing' means, generally, in existence immediately before and not having lapsed or expired before the appointed day" which, by L.N. 475/65, is January 1, 1966.

He accordingly submitted that as at the appointed day, namely January 1, 1966, title in respect of the parent Holding 240, having long before been surrendered pursuant to the Deed of Surrender dated November 9, 1953, was no longer then in existence. On the other hand, immediately before the appointed day, the pre-existing title for Holding 255 was Statutory Land Grant 194/4956.

Upon this premise, it was argued that in deciding the type of Replacement Title for Holding No. 255, namely, whether it should be a Grant (First Grade) or a Grant simpliciter, one had to consider the nature of S.L.G. 194/4956.

It was pointed out that Statutory Land Grants which conferred an estate in fee simple had the following characteristics:

(1) They are not subject to the revision of rent.

(2) They are not subject to the conditions and covenants of the Lands Ordinance, for example, the words "subject to the covenants and conditions contained in the said Ordinance" are deleted from the title documents.

(3) The words "in fee simple" are added in the title deeds in ink.

(4) The relevant sections of the Lands Ordinance are quoted in the title deeds, for example, section 11 Ordinance No. 34 or section 12 Crown Lands Ordinance Cap. 113.

It was accordingly submitted that if one looks at the title deed of Holding 255 one finds none of the above characteristics. On the contrary, one finds that it is subject to the revision of rent and the covenants and conditions of Cap. 113.

To emphasize the point, I was referred to the affidavit of Encik Muhammad Khalil bin Abdullah, the Deputy Commissioner of Land Titles, Penang, and annexed to which was a photostat copy of S.L.G. 32689/4644, being Exhibit "DCL 2," wherein the words "in fee simple" were inserted in ink and the printed words "subject to the covenants and conditions contained in the said Ordinance and to the further conditions endorsed on this Grant" were deleted. It was said that had a grant in fee simple been intended the Commissioner would likewise have made the same addition and deletion to the title deed for Holding 255 but that he had refrained from doing so.

In my opinion, for reasons which I shall presently state, the provisions of section 11(4) of Cap. 113 governing re-grants on surrender of lands for subdivision and the definition of document of original title in section 4(1) put paid to the submissions of the learned Legal Adviser.

The crucial words in section 11(4) of Cap. 113 are to be found in the phrase "in order to make the new tenure not less beneficial than the original one." Accordingly, the nature and quantum of the estate or tenure held by Ban Hin Co., the appellant's predecessor in title, immediately before surrender is an issue of critical substance.

The key to the resolution of this issue is afforded by the definition of "document of original title" in section 4(1) by the terms of which, I am required to determine the original grant, inden-

ture, lease or other instrument made by the relevant authorities from which the pre-existing title (that is to say, existing immediately before January 1, 1966) to a holding or part of a holding descends or is presumed to descend. Clearly, therefore, this requires me to look back *not* up to December 31, 1965, as the learned Legal Adviser contends, but as far back as possible before that date.

Now, it was common ground that the original tenure, namely the original titles of the parent Holding 240, comprised six indentures, three grants and two leases.

It was submitted by learned counsel for the appellant, and I agree, that a study of the accumulation of deeds shows that the majority of the titles concerned conferred an estate in fee simple. I admit to seeing an attractive force in this submission backed as it is by the opinions of learned conveyancing counsel. Courts of justice have always in the past paid great regard to the uniform opinion and practice of eminent conveyancers which, as said by James L.J. in *Ford* v. *Hill*[3] at page 370, "is to be looked upon as part of the Common Law."

However, even without the aid of the opinions of these conveyancing counsel, I am clearly of the view that the majority of the titles concerned do confer an estate in fee simple. Indeed, the learned Legal Adviser did not seek to argue the contrary and rightly so.

For those who are interested in details, I have annexed to this judgment, in the shape of an Appendix, a summary of the indentures concerned.

As to the argument based on the affidavit of Encik Muhammad Khalil bin Abdullah, I found no substance in it. I say so because the Commissioner can in no way avoid the strict terms of section 11(4) of Cap. 113 and the definition of the document of original title in section 4(1) by the simple expedient of using pen and ink to make additions and deletions to a title deed for this would amount to making unauthorised amendments to explicit statutory provisions.

Accordingly, it is my opinion that a case of "majority title" arises by virtue of section 46(2)(a)(i) which provides:

"46. (2) Where the separate titles are of different kinds, then –

(a) if there is a majority title and ... –

(i) it is superior to the other separate titles; ...

(ii) ...

the Commissioner may issue a merged title in the same form as the majority title;"

Section 46(4)(a) and (b) defines majority title as:

"46.(4) In this section "majority title" means –

(a) a single separate title to the greater part of a holding; or

(b) two or more separate titles of the same kind which together cover the greater part of a holding."

Similarly, I found no substance in the pleas of waiver and acquiescence which, it was said, arose by reason of Ban Hin Co. remaining passive and doing nothing to assert their rights.

I must confess I was somewhat startled by this submission because I was invited to make findings adverse to Ban Hin Co. when it was not even a party to these proceedings and without my hearing it. Nevertheless, I shall state my reasons for dismissing both these pleas.

By definition, waiver is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of a confession and avoidance if the right is thereafter asserted: *Banning* v. *Wright*[4], and is either express or implied from conduct. It may sometimes resemble a form of election and sometimes be based on ordinary principles of estoppel: *Kammins Ballrooms Co. Ltd.* v. *Zenith Investments (Torquay) Ltd.*[5] – although, unlike estoppel, it must always be an intentional act with knowledge: *Earl of Darnley* v. *London Chatham & Dover Railway Co. (Proprietors) Etc.*[6] at 57 per Lord Chelmsford L.C. and *Auckland Harbour Board* v. *Kaihe.*[7]

Having thus stated the general principles relating to waiver I now turn to consider the objection based upon it.

In my opinion, section 11(4) Cap. 113 is designed in the public interest to protect the grantee of a re-grant by conferring upon him a title no less beneficial than that he enjoyed under his original grant. The words of the subsection are absolute, explicit and peremptory. They are, therefore, not capable of being waived (see *Edward Ramia Ltd.* v. *African Words*).[8]

Then again, Ban Hin Co.'s title to Holding 255 was never challenged, how then could it be said that there was an intention on its part to waive anything? The evidence before me shows that Ban Hin Co. had no reason to suppose that their title was anything less than a fee simple absolute in possession. Indeed, I have so held for the reasons stated.

As for the plea of acquiescence, it is available when a person refrains from seeking redress although there is brought to his notice a violation of his rights of which he did not know at the time and, in that sense, acquiescence is an element in laches. I have already said there was in this case no violation of Ban Hin Co.'s rights to Holding 255 and I fail to see how a plea of acquiescence will arise.

In the result, reason and justice combined to indicate that I should answer the questions posed in the Special Case thus:

Q.(a): Should the Director have applied section 40 or section 41 of the Act?

A.(a): He should have applied section 40.

Q.(b): If section 41 applies is the title to Holding 255 held in fee simple or not?

A.(b): In consequence of my answer to question (a), question (b) does not arise.

I accordingly remitted this matter to the Chairman of the Land Titles Appeal Board in accordance with the provisions of section 18(3), who will proceed with the hearing accordingly.

The appellant will have the costs of these proceedings to be taxed on the higher scale. However, I refused a request for costs for two counsel since I did not consider the issues, though admittedly novel, to be so difficult as to justify the making of such an order.

Order accordingly.

Solicitor: *Lee Kok Liang & Co.*

A *APPENDIX*

SUMMARY OF INDENTURES

Indenture of 29.11.1912 (Document N p. 27)
Between Oon Geok Teah, Koh Cheng Lean, Koh Cheng Siew & Yeap Keng Teng
And
The Penang Coconut Estates Limited

Recital
First Schedule Part I
(All those pieces of land etc. to form Lot 71, 122 and 220 Mukim IV Lot 263 Mukim E Lots 44 (III) and 44 (IV) etc. endorsed on the plan attached ... which, in the case of Lots 71, 122 and 220 include the 50 acres more or less of Crown Land referred to in Part II (hereof)

Schedule Part II
(All that piece of land comprised in Lots 71, 122 and 220 Mukim IV having a total area of 50 acres or thereabouts and said by the D.O. Balik Pulau to form Crown Land)

Second Schedule
(All those lands etc. comprise the whole of the lands contained in Lots 71, 122 and 220 Mukim IV (and the Crown Lands referred to etc.)
Lots 71, 122, 220 394a. 1r. 24p.
1st part of 1st schedule – fee simple
2nd part of 1st schedule – long and uninterrupted possession

Habendum To hold the lands in 2nd schedule ... for ever

D.O.B.P's note Lots 71. 122 (346a. 2r. 20 p.) and 220 (7a 3.04)

Entry in Registry of Deeds

Survey No.	*Lots 71*	*122*	*220*	etc.
	a	b	c	
Title No.	qts 2627, 1777 & L. 10018 etc.			

Indenture of 30.11.1920 (Document O) (p. 35)
Between Penang Coconut Estates Ltd.
And
Ho Kim Teik

Recital
All those 2 pieces of land etc. comprised in Grants 2627, 1777 and Lease 10018 and 346a. 2r. 20p. known as Lots 71 & 122, Mk. IV S.W.D. Penang.

Statutory Land Grant 21786 of 47a. 3r. 04p. known as Lot 220, Mk. IV Batu Itam S.W.D. Penang.

Fee simple in possession

Habendum To hold ..... in fee simple

D.O.B.P.'s note Lot 71 and 122 S.A. 346a. 2r. 20p.

Entry in Rgy of Deeds
Title: Part Grant 2627, G. 1875, 2609, Ind. 60, P. Ind. 177, G. 1777, Ind. 124, Lease 10018 Ind. 140 r. 71, Lease 10044, Ind. 53

Indenture of 25-9-37 (Document P) (p. 39)
Between Public Trustee
And
Yeap Chor Ee

Recital
All that piece of land comprised in Statutory Grant 2627, Grants 1875, 2609, 1777, Indentures 60, 177, 124, 140, 71 & 53 and Lease 10018 and 10044 said to form Lot 240 (formerly Lots 71 and 122) Mk. 4 of 347a. 2r. 00p.

And also Lot 220
And also Lot 69(1)
Fee simple in possession

Habendum of freehold in fee simple and of leasehold tenure for respective unexpired residue of term.

Dy. C.L.R.B.P.'s note: same as above

Indenture of 14-12-2602 (1942) (Document Q) (p. 45)
Between Ban Hin Lee Bank Ltd.
And
Tan Aik Joo

Recital
Recites the 12 titles (Lot 240)
Also Lot 220
Also Lot 69(1)
Fee simple in possession

Habendum to hold in fee simple and for unexpired terms of leases

D.O.B.P.'s note: Lot 240 347a. 2r. 00p.

Indenture of 19.9.51 (Document R) (p. 49)
Between Tan Aik Joo
And
A. Kandsamy

Recital
The 12 titles (Lot 240)
And also Lot 220
And also Lot 69(1)
in fee simple and entitled to lands etc. assigned.

Habendum To hold in fee simple and unexpired term etc.

D.O.B.P.'s note: Lot 240
347a. 2r. 00p.

Indenture of 1.8.53 (Document S) (p. 53)
Between A. Kardasamy
And
Ban Hin Co. Ltd.

Recital
Lot 240
Lot 220
Lot 69(1)
Fee simple in possession and also entitled to leasehold lands

Habendum As to freehold lands to hold same unto Co. and its assigns and as to leasehold lands to hold same for mentioned term.

TENGKU JAYA BIN RAJA HASSAN v. MOHAMED BIN ZAKARIA & ANOR. (TALASCO INSURANCE SDN. BHD., Intervener)

[O.C.J. (Abdul Malek J.) September 17, 24 & October 31, 1985]

[Kota Bharu – Civil Suit No. 93 of 1983]

Practice and Procedure – Default of appearance – Interlocutory and final judgments – Application to set aside – Intervention by insurer – R.H.C. 1980 0.12 r.4(a).

Tort – Negligence – Damages – Assessment – Interlocutory and final judgments – Setting aside – Intervention by insurer – Road Traffic Ordinance 1958, s.80.

This is an appeal by the first defendant and the intervener against the dismissal of the first defendant's application to set aside the judgment and the intervener's application to intervene. The plaintiff had obtained on October 13, 1983 interlocutory judgment against both defendants in default of appearance and final judgment on July 25, 1984 after a hearing to assess damages, where the first defendant was present. On January 28, 1985 the first defendant applied to have both judgments set aside on the grounds that he was not served with the writ and that there were merits in the defence. On March 4, 1985 the intervener (the insurer) applied for an order that it be at liberty to intervene in the proceedings.

Held: (1) service was regular on both the defendants and that the insurer was liable as the required notice had been served on it;

(2) from the sketch plan, the first defendant was solely to blame for the accident. He had failed to produce to the court evidence that he had a *prima facie* defence;

(3) there was no reason to set aside the interlocutory and final judgments against both defendants or to allow the intervener to intervene at this late stage.

[*Editorial Note:* Appeal to the Supreme Court filed on October 21, 1985 was withdrawn on January 28, 1986]

[Cases cited: *Bank Bumiputra Malaysia Bhd.* v. *Majlis Amanah Ra'ayat* [1979] 1 M.L.J. 23; *P.T. Pelajaran Nasional Indonesia* v. *Joo Seang & Co. Ltd.* [1958] M.L.J. 113; *Leonard* v. *Nachiappa Chetty* (1923) 4 F.M.S.L.R. 265; *Ang Chee Seng* v. *Tan Khee Swee* [1935] M.L.J. 245; *Chua Soo Lee & Anor.* v. *City Council of Singapore* [1967] 2 M.L.J. 121; *Re Youngs* (1885) 30 Ch.D. 421; *Re Application of Asia Insurance Co. Ltd.* [1968] 2 M.L.J. 228; *Chong Kueng Ying & Ors.* v. *Lovis Lavagna* [1971] 2 M.L.J. 225; *The Chinese Tin Mines Rehabilitation Loan Board* v. *Chee Hoi Voon* [1959] M.L.J. 152; *The Hongkong & Shanghai Banking Corporation* v. *Ismail bin Daud & Anor.* [1978] 2 M.L.J. 160; *Evans* v. *Bartlam* [1937] A.C. 473.]